IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 18TH JANUARY 2006 / 28TH POUSHA, 1927

MFA.No. 502 of 2001()

OPMV.664/1998 of MOTOR ACCIDENT CLAIMS TRIBUNAL, OTTAPALAM

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APPELLANT:

SREEDHARAN, S/O.GOVINDAN, KARIMBANCHOOLA VEEDU, VEERAMANGALAM, TRIKKIDEERI, OTTAPALAM TALUK, PALAKKAD DISTRICT.

BY ADV. SRI.SANTHEEP ANKARATH

RESPONDENTS:

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1. E.ABDUL JALEEL, S/O.E.MUHAMMAD, NACHAYIL HOUSE, AMBALAPARA POST, OTTAPALAM TALUK (REGISTERED OWNER OF THOUFEQ BUS NO.NEH-1416).

2. SATHYAVAN, S/O.LAKSHMANAN, PATHAYIL HOUSE, KINAVALLUR POST, PARALI, PALAKKAD (DRIVER OF BUS KEH-1416).

3. THE NEW INDIA ASSURANCE CO.LTD., J.R.J. COMPLEX, OTTAPALAM. (INSURER OF BUS KEH-1416) POLICY NO.3176110360206. CER.NO.506/99999).

BY ADV. SRI.KKM.SHERIF

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 18/01/2006, ALONG WITH MFA NO. 606 OF 2001 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

M.F.A.No. 502 of 2001

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M.F.A.No.606 of 2001

Dated this the 18th January, 2006

JUDGMENT

Both these appeals are filed by the claimants. These arise from a common award passed in O.P.(M.V).Nos.664 of 1998 and 663 of 1998 on the file of the Motor Accidents Claims Tribunal, Ottapalam. Appellant made a claim for the injuries sustained by him as well as for the damage caused to the rickshaws, consequent to the motor accident involving a bus driven by the second respondent. First respondent is the owner of the said vehicle and the third respondent is the Insurance Company.

2. According to appellant, on 19.5.1998 at about 1.30 p.m. while he was driving the autorikshaw on a public road from west to east, the bus driven by the second respondent overtook the vehicle and stopped it abruptly just in front of the autorikshaw by applying sudden brake. The appellant could not stop his vehicle and hence it hit against the rear side of the bus causing damage on the rickshaw, as well as on the appellant. He was treated in the hospital. F.I.R. was lodged by him, the copy of which is Exhibit A1. Wound certificate and other

certificates were produced and marked. Respondents 1 and 2 filed written statement denying the alleged negligence and rashness on the part of the second respondent. They also denied their liability to pay compensation. The third respondent also took up the same contensions but admitted that the bus is insured with the third respondent. Both the cases were tried jointly. PWs 1 to 4 were examined on the side of the appellant. Exhibits A1 to A11 were marked on the side of the appellant. Respondents did not adduce any oral evidence, but marked Exhibits B1 to B3.

3. The court below, on an assessment of the evidence came to a finding that the accident occurred due to the sole negligence of the petitioner and that the second respondent was not responsible for the accident. According to the learned Tribunal, the autorikshaw was driven rashly and it it behind the bus, which was parked near the bus stop. Based on this finding both the petitions were dismissed.

4. Appellant vehemently challenges the findings of the Tribunal regarding the rashness and negligence attributed to the appellant. It was contended that there was no evidence to enter such finding. According to learned counsel for appellant, Tribunal relied upon the scene mahazar and other materials to arrive at such a finding which was not legal. In the light of the submissions made, I carefully examined the pleadings, evidence and findings adduced in this case. The appellant pleaded that the accident occurred due to the rash and negligent driving of the bus by second respondent. According to appellant, the

bus was coming from the backside and it overtook the autorikshaw driven by the appellant at a high speed and suddenly stopped the vehicle in front of the autorikshaw without giving sufficient time for the autorikshaw to apply brake and avoid the accident. PW1 gave evidence in tune with the pleadings. PW2 was also examined to corroborate the evidence of PW1 to prove the alleged accident and the alleged rashness and negligence on the part of the second respondent.

5. PW1 is the appellant himself who is interested in the claim. His evidence can be accepted only if there is sufficient corroboration from other source. PW2 deposed that he was driving his vehicle 10 to 20 meters away from the autorikshaw driven by the appellant. His presence at the scene appears to be doubtful in the light of his version in cross-examination that the trip sheet will not show that he was driving the autorikshaw at the time when the accident occurred.

6. PWs 1 and 2 gave evidence more or less consistent with the case set up by the appellant in the pleadings. Appellant also marked Exhibit A1 F.I.R., as per which a crime was registered against the second respondent under Sections 279 and 337 IPC. But Exhibit A1 F.I.R will not be of any help to prove negligence of second respondent because PW1 admitted in cross-examination that the case was subsequently referred by the police. The appellant has no case that though the complaint filed by him was referred, he had filed any protest complaint. There is nothing in evidence to show that the appellant had taken up proceedings after referring the case filed by him.

The respondents produced a charge sheet.

7. It can also be seen that the appellant has admitted in cross-examination that one Pathumma was also a passenger in the autorikshaw driven by the appellant. It is also seen from his evidence that the said Pathumma was also injured. In all probabilities the said Pathumma will be most reliable person who will be able to speak something about the accident. Having admitted that Pathumma was injured in the same incident and that she was travelling in the autorikshaw, the best piece of evidence will be that of Pathumma. She was not examined.

8. The appellant admitted that the said Pathumma filed a complaint against the appellant himself in respect of the accident. It is also admitted that a case was taken up by the Police on the basis of the complaint given by the said Pathumma. Exhibit B2 is the charge sheet produced by the respondents in this case which shows that a charge sheet was laid against the appellant himself in respect of the same accident under Sections 279 and 337 IPC. Therefore, prima facie it appears from the evidence adduced by the appellant himself that the Police had registered a case against the appellant for rash and negligent driving, on the complaint filed by the passenger in the autorikshaw driven by the appellant. It was also stated by the appellant that the said Pathumma had not made any claim before the court. In the above circumstances, on the basis of the evidence, a finding can be entered that the appellant has not established that the accident occurred due to rash and negligent driving of the bus by the second respondent.

9. When a claim is made by the appellant for compensation under Section 166 of the Motor Vehicles Act, it is for him to establish that he sustained injuries as a result of rash and negligent driving of a motor vehicle by a particular person. This aspect has not been established and the appellant has not discharged the burden of proof on this aspect. It is true that the Tribunal made an enquiry into the fact as to who was responsible for the accident and whether the accident occurred due to rash and negligent driving of the appellant himself. For this purpose the Tribunal travelled a bit far away from the crucial aspect to be considered in this case.

10. It was not the duty of the Tribunal to find out whether the appellant himself was responsible for the accident, in the facts and circumstances of this case. It was sufficient if the Tribunal examines the pleadings and evidence to come to a conclusion whether the appellant established the relevant facts to get compensation from the respondents, particularly, second respondent. But, the appellant failed to establish that the accident occurred due to the rash and negligent driving of vehicle by the second respondent. The claim petitions were, therefore, rightly dismissed.

11. Learned counsel for the third respondent points out in this context that the damage which was caused to the bus was on the rear right side of the bus and this fact cannot be disputed in the light of the scene mahazar prepared and marked in this case. If an accident occurred as alleged by the appellant due to the rash and negligent driving of the vehicle by the

second respondent, the damage could not have occurred on the right rear side of the bus. Learned counsel for the appellant submitted that no reliance can be placed on the scene mahazar, since it has not been proved even by consent. The contents of the scene mahazar cannot be relied on, is the submission made on behalf of the appellant.

12. No documents are produced to prove the nature of the damage sustained by the bus or the rickshaws . The appellant has failed to establish this fact by producing necessary documents.

13. A Single Bench of the Orissa High Court held that in a case where the F.I.R. was lodged on the basis of an intimation given by the doctor from the hospital, in the absence of examination of the doctor, the contents of the F.I.R. Cannot be relied upon. The F.I.R. is not a piece of evidence to substantiate the evidence.

14. Learned counsel for the appellant vehemently contended that this is a fit case where the doctrine of res ipsa loquitur is to be applied. He also placed reliance upon the judgment of the Orissa High Court reported in ***Anita Jena v. Sarat Chandra Pattnaik*** (1999 ACJ 1046) in support of his argument. In a case where the owner of the vehicle involved in the accident took up a specific stand that the truck was in a standstill condition and the scooter dashed against the truck from behind, the Orissa High Court in the absence of non-examination of the driver and cleaner of the truck drew an adverse inference and held that in the absence of any possible

explanation, the doctrine of res ipsa loquitur shall come into play. On a careful reading of the decision cited above, I find that the said principle cannot be applied to the facts and circumstances of this case.

15. I have already adverted to the fact that the appellant failed to produce any materials showing the nature of the damages sustained by both the vehicles. If some documents were forthcoming, it would have been possible for the court to infer whether the accident occurred as alleged by the appellant or by the respondents. It has to be remembered that in a case of this nature that the burden is always on the claimant. The mere examination of claimant or an eye witness itself will not establish disputed fact. This is specially so, since it has come out from the cross-examination of PW1 himself that the Police has charge sheeted a case against the appellant for rash and negligent driving on a complaint filed by the passenger of the autorikshaw. To apply the doctrine of res ipsa loquitur several aspects have to be considered by the court. The most relevant aspects are the circumstances.

16. Circumstantial evidence have to be placed before the court for aiding the court to draw an inference, applying the principle of doctrine of res ipsa loquitur. But except oral evidence, no other circumstances are pointed out , based on which an inference can be drawn applying the said doctrine. This is a case where scene mahazar, report of the Motor Vehicle Inspector, etc. would be of great relevance. It would a

case where the examination of passenger would help the court in coming to the conclusion as to who exactly was at fault in driving the vehicle. Non examination of the injured who was travelling in the same autorikshaw coupled with, the withholding of the scene mahazar, Motor Vehicle Inspector's report etc. would only go against the case set up by the appellant. There is no explanation in non production of the material evidence before the court.

In the above circumstances, I do not find any reason to interfere.

This appeal is dismissed.

K.HEMA, JUDGE

vgs.

K.HEMA, J.

M.F.A.NO.502 OF 2001

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M.F.A.NO. 606 OF 2001

JUDGMENT

18.1.2006